PUBLIC PROSECUTOR

v.

KAVARAPPAN SADIAN

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CRIMINAL APPEAL NO. 85 OF 1983]
28 AUGUST 1987

CRIMINAL LAW AND PROCEDURE: *Criminal breach of trust - Accused made good money misappropriated - Whether it makes offence of cheating or CBT any lesser - Question of mitigation - Whether any evidence of dishonesty on part of accused.*

EVIDENCE: *Whether finding of learned President against the weight of prosecution evidence - Question of demeanour or credibility of witnesses not in issue - Jurisdiction of Appellate Court to evaluate evidence on record of trial Judge/President.*

This was an appeal by the Public Prosecutor against the order of acquittal and discharge of the respondent made by the President, Sessions Court, Seremban after the respondent was directed to enter his defence on a charge of criminal breach of trust punishable under s. 409 of the Penal Code.

Held:

[1] Making good the money that was misappropriated does not make the offence of cheating or CBT any lesser but goes to mitigation, if any.

[2] The evidence of the offence of criminal breach of trust is overwhelming against the respondent in spite of the fact that there were some scurrilous attempts by PW1 to help the respondent out.

[3] There is no doubt and no hesitation whatsoever that the learned ex-President had ignored the various instances of telling evidence that clearly show that the respondent had committed the offence for which he was charged. There is indeed ample evidence of dishonesty on the part of the respondent and the offence of breach of trust committed by him.

[4] The learned President's finding was completely against the weight of the evidence for the prosecution and he had erred in his finding that there was this "blanket authority" given by PW1 to the respondent.

[5] In the circumstances the appeal by the Public Prosecutor was allowed. The order of acquittal and discharge of the Court below was set aside and an order of conviction of the respondent was substituted on the charge. The respondent was sentenced to 6 months' imprisonment.

[Appeal allowed. Order of acquittal and discharge set aside and substituted by a conviction. Respondent sentenced to 6 months' imprisonment.]

[Editor's Note: The application of the accused/respondent to the Supreme Court for leave to appeal (*vide* Supreme Court Criminal Application No. 22/87) was refused on 9 November 1987 (Coram: Abdul Hamid CJ Malaya, E. Abdoolcader SCJ & Syed Agil SCJ)]

Case referred to:
Lim Kheak Teong v. Public Prosecutor [1984] 1 CLJ (Rep) 207

Legislation referred to:
Penal Code, s. 409

For the appellant - Abu Bakar Zaid, DPP
For the respondent - V. Balasingam; M/s. Joseph & Son

JUDGMENT

Mustapha Hussain J:

This is an appeal by the Public Prosecutor against the order of acquittal and discharge of the respondent made by the President of the Sessions Court, Seremban, after the respondent was directed to enter his defence.

The charge against the respondent reads as follows:

> That you on or about 1 February 1979 at the Chartered Bank, Port Dickson, in the District of Port Dickson, in the State of Negeri Sembilan, being a public servant, to wit, headmaster of Sekolah Kebangsaan (Tamil) Port Dickson and in such capacity was entrusted with certain property, to wit, Chartered Bank (Port Dickson) cheque No. 355013 dated 1 February 1979 amounting to RM1,122 in the name of T. Selvarani, committed criminal breach of trust in respect of that property and you thereby committed an offence punishable under s. 409 of the Penal Code.

The trial of this case started before the President of the Sessions Court on 25 April 1983 and terminated on 7 December 1983 when the learned President acquitted and discharged the respondent after his defence was called. The learned President later resigned from service on 3 November 1984 and went into private practice and he did not bother to write the grounds of judgment for some considerable time. He kindly wrote the grounds of judgment on 15 April 1987, some 3 years 4 months and 8 days after he made the order of acquittal of the respondent and some 2 years and 5 months in private practice. For want of a better euphemism the delay, for whatever reason, can be described as scandalous.

The respondent was the headmaster of SRJK (Tamil) at Port Dickson, in 1979. All cheques for the school, like cheques for payment of salaries and arrears of salaries etc. of the school and teachers will be prepared and signed by the headmaster and also by the chairman of the board of governors of the school.

It came to pass that one of the teachers of the school named Selvarani d/o Thamby Muthu (PW1) had some arrears of salary due to her for period 1 March 1978 to 31 December 1978, which amounted to RM1,122. As she still did not receive her arrears due until June 1979, she asked the headmaster (the respondent here) about the payment but was told that the arrears had not arrived yet from the education department. Then she met a friend of hers who told her that she had already received her arrears. She then asked the respondent and went to the education department in Seremban, where she saw one Mr. Sabaratnam who sent her to the organiser of Tamil schools, Mr. Kanniah a/l Gopal.

The next day Mr. Kanniah went to the school, saw the respondent and later explained to the teacher (PW1) that the respondent had used the arrears and that the respondent will pay back and settle the amount due to her within a specified time agreed between the respondent and the organiser Mr. Kanniah. The respondent had used the money and had agreed to return it in full, which he did later.

PW1 said in evidence "He (the headmaster, the respondent) made the 1st payment in my house. He paid me, if I am not mistaken RM822. He paid me in cash. Yes, in the presence of my parents. He apologised for what had happened. He said that he had some difficulties and had used the money." ... "He gave me the remaining RM300 at the school a few days later. This 2nd amount was also paid in cash."

A Chartered bank cheque (P3 A & B) was shown to PW1 and she identified the two signatures on the reverse side as that of the respondent. She said that the third signature "T. Selvarani" was not her signature. PW1 emphatically said that the third signature on the reverse of the cheque was not hers. On cross-examination (p. 6 of the record) it was put to her by Counsel for defence as follows:

Put : **The accused showed you this cheque on 1 February 1979.**

Answer : **It is not true.**

Put : **You signed your name at the back of the cheque on 1 February 1979.**

Answer : **No I didn't.**

In cross-examination PW1 agreed that she had given permission to the respondent to use her money first when the arrears came and repay her later.

In re-examination it transpired that during the car ride PW1 took in respondent's car from Port Dickson to Seremban after her extra curricular activities, the respondent has asked PW1 whether she could lend him some money, to which she had replied "... **he could make use of my arrears first."** PW1 concluded her evidence on page 8 of the record with the following statement:

No. I did not tell the accused that he could make use of the arrears without informing me. I told he could make use of the arrears first.

Yes, I meant I would give him a loan when the arrears arrived. No, I did not give the accused a loan at any time.

x x x

By Court : **Were you annoyed with the accused for using the money?**

Answer : **Yes.**

The organiser of Tamil schools Mr. Kanniah s/o Gopal (PW2) gave evidence. After the complaint by PW1 that she had not received her arrears of salary on 19 June 1979 this organiser went the next day to the school to check on this complaint. PW2 discovered that the arrears in question had been credited by the education department to the school account together with the staff salaries on 31 January 1979. On checking the relevant vouchers, he found the arrears to have been released to PW1 and on further checking the cheque book he found that a cheque for the arrears amounting to RM1,122 dated 1 February 1979 to have been issued to the teacher PW1.

The organiser of Tamil schools (PW2) went on to say, at p. 10 of the record:

I questioned the headmaster about this withdrawal. The accused admitted having used the money. **There was no talk about why the money was taken or how it was used.** He requested a period of 20 days to settle this amount with the teacher concerned ...

In his defence, the respondent testified that he had some financial commitments of about RM1,000 and he told about this to PW 1 when she was travelling with him in his car from Port Dickson to Seremban some time towards end of November 1978, and asked her whether she could help him with some money amounting to RM1,000 to which she said:

Mr. headmaster I don't have that amount of money, when my arrears come you use it.

This conversation was supposed to have taken place in the car towards the end of 1978. When confronted by the PO in cross-examination that the school was closed for holidays from 14 November 1978 till end of December 1978 and that the offer of appointment for PW1

(as a result of which PW1 was due to get the arrears in question), had not been sent by 14 November 1978, the respondent replied he may be wrong (see p. 23 of the record). It was also put to the respondent (on p. 24 of the record) that the letter of confirmation of appointment of PW1 was written on 15 January 1979 and received by the education office only on 18 January 1979, the respondent replied that he had no knowledge of this.

On p. 24 of the record when the respondent was cross-examined by the PO this is what respondent said when confronted with the letter of confirmation of appointment of PW1 whereby PW1 was due to receive arrears of salary and the consent given by PW1 in the car that respondent could use the arrears, at end of 1978:

> P2 shown to witness. Yes (this) is a letter of confirmation of PW1's appointment from the education service commission.
>
> The rubber stamp says it was received by the education office on 18 January 1979. Yes a copy of this letter was sent to me in the school. Yes I would have received this letter only after the 15 January 1979.
>
> Yes I could only have prepared the vouchers after 15 January 1979. Yes I prepared the vouchers on 23 January 1979.
>
> PO Why did you say PW1 was confirmed in November 1979?
>
> Answer : I was mistaken.
>
> Put : In November 1979 this conversation did not take place?
>
> Answer : It did - she asked.

(Obviously there is a typing error here of the year; it should read **"November 1978",** as both parties were referring to the conversation that took place in the car between PW1 and the respondent).

Respondent stated further in his defence:

> **Yes I did tell PW1 how much she was entitled to. After sending out the vouchers I told her.**
>
> **Yes I also told her that I had sent out the vouchers. Now I say that she gave me permission to use the money in the early part of 1979.**
>
> PO When?
>
> Answer : Before I prepared the voucher on 23 January 1979.

As regards the forged signature of PW1 at the back of the cheque, respondent explained that he had given this cheque to Murugayah who had forged PW1's signature. Respondent was angry, snatched the cheque back from Murugayah and signed the cheque himself and cashed it. Murugayah also gave evidence as a witness for the defence and admitted having written PW1's signature at the back of the cheque. Murugayah said he just wrote "T. Selvarani" but not as a signature. But when confronted why he had put a line under the name, he said it was done on impulse.

This witness for the defence, Murugayah (DW2) said in one breath "Until now I don't have a bank account" and in the next he said "Now I say I made a mistake, I do have a bank account."

Later on, on being asked about his writing or signing "T. Selvarani" at the back of the cheque, he agreed it would look like a signature.

In his very very belated grounds of judgment, the learned ex-President stated that there was this unique situation where the key prosecution witness gave evidence that provided the accused with an almost complete answer to the charge. That is PW1 had given to the respondent a "blanket authority to use the money as and when it arrived". The learned ex-President went on to say "It is beyond dispute that when one person gives another the authority to use his or her money entrusted to the other, there can be no criminal breach of trust by the latter. The elements of dishonesty and misappropriation would be lacking. And if not for the rigours of *PP v. Hau Tua Tau*, the Court may not even have called upon the accused to enter on his defence." In the premises the learned ex-President held that the **"accused had more than rebutted the case against him"** and the respondent was therefore acquitted and discharged.

It is true that an Appellate Court will be slow in upsetting a judgment in a case that was tried and decided upon by a Court or Judge (in this case the President) on finding the trial Judge had made. When a question of fact had been tried by a Judge without a jury and there is no question of misdirection of himself by the Judge, an Appellate Court should not come to a different conclusion on the evidence unless it is satisfied that the advantage enjoyed by the trial Judge by reason of having seen and heard the witness could not be sufficient to explain or justify the trial Judge's conclusion - (see *Lim Kheak Teong v. Public Prosecutor* - [1984] 1 CLJ (Rep) 207). It is sufficient for an accused to cast a reasonable doubt in the case for the prosecution to entitle him to an acquittal.

It is in the light of this legal principle that this Appellate Court now has to consider this appeal.

The learned ex-President has stated that PW1 had given a "blanket authority" to the respondent to make use of the amount of arrears as and when it came. This so called "blanket authority" was given in the car on the journey from Port Dickson to Seremban by PW1 to the respondent and according to the respondent this authority was given some time towards the end of the year 1978. If the learned ex-President had gone through the evidence in its totality, he would have found that the respondent came to be aware of the letter of confirmation of PW1's appointment that entitled PW1 to receive the arrears only after 15 January 1979. Even to the gullible this is indeed a lie.

PW1 herself stated that she did not tell the respondent that the respondent could use the money first without informing her. And when she found that the respondent had used the money, she was annoyed. Surely, even to the simple minded, if she had given such a blanket authority, why then should she be annoyed?

Then, the evidence of the organiser of Tamil schools PW2. Nothing was said by the respondent that respondent was given this blanket authority to use the arrears money of PW1. Again, about the respondent going to PW1's house to pay the first instalment of RM822 only after being queried by PW2, the organiser of Tamil schools, why indeed the first instalment to settle? Why the apology? After all the respondent had this blanket authority to use the money as long as he wanted. And again, the second instalment of RM300?

Had the learned ex-President considered that the cheque in question was crashed on 1 February 1979 and up to June 1979, there was complete silence and only after PW1 had met a friend of hers who told her that she (the friend) had already received her arrears, PW1 enquired about her arrears? Why this silence on the part of the respondent of nearly five months? Surely one would expect the respondent to tell PW1 that her arrears had come and he (the respondent) had used PW1's arrears money since PW1 had given him the authority to do so. And yet in his evidence, the respondent said when he prepared the voucher for the arrears on 23 January 1979, he had shown the voucher to PW1.

Strange, in the cross-examination of PW1, it was put to her that she signed her name at the back of the cheque. And later, at the defence stage, it was Murugayah who wrote (not signed) "T. Selvarani" at the back of the cheque? If this is not a cooked up defence, why put to PW1 the question that she signed behind the cheque? There was quite a time lapse when the defence requested an adjournment to prepare the defence after the respondent was called upon to enter his defence.

If the learned ex-President had considered all these salient features of the evidence, he would have irresistably come to a different finding from the one he had made.

One must not forget that PW1 and the respondent are of the same race and respondent the elder, superior in the school and head of PW1.

Making good the money that was misappropriated does not make the offence of cheating or CBT any lesser but goes to mitigation if any.

An Appellate Court is in no lesser position to evaluate the evidence on the record than the trial Judge or President could, where the question of demeanour is not in issue or has any bearing on the credibility of the witnesses.

The evidence of the respondent as well as his witness Murugayah clearly shows many instances of sheer lies. Respondent had said that he was given the blanket authority to make use of the arrears money of PW1 some time at the end of the year 1978. It is on record that the letter of confirmation of PW1's appointment came only after 15 January 1979 and only then PW1 would have known that she was entitled to get her arrears. This evidence is quite clear. What further evidence of dishonesty is required?

And Murugayah's evidence of changing his evidence, on he having a bank account and about the signature of PW1 he wrote or signed at the back of the cheque.

From the record, the evidence of the offence of criminal breach of trust is overwhelming against the respondent in spite of the fact that there were some scurrilous attempts by PW1, the teacher, to help the respondent out - this is very clear if one reads the notes of evidence.

This Appellate Court, with no doubt and no hesitation whatsoever, is of the view that the learned ex-President had ignored the various instances of telling evidence that clearly show that the respondent had committed the offence for which he was charged. There is indeed ample evidence of dishonesty on the part of the respondent and the offence of breach of trust committed by him. Had the learned ex-President given some, however slight a consideration, to the evidence of the prosecution witnesses, his finding should have been different. The learned ex-President's finding was completely against the weight of the evidence for the prosecution and he had erred in his finding that there was this "blanket authority" given by PW1 to the respondent.

In the circumstances, the appeal by the Public Prosecutor is allowed. The order of acquittal and discharge of the Court below is set aside and I substitute thereto an order of conviction of the respondent on the said charge.

Sentence:

The respondent is sentenced to six months' imprisonment.

Also found at [1987] 2 CLJ 453